



AN BILLE UM NOCHTADH COSANTA, 2013
PROTECTED DISCLOSURES BILL 2013

EXPLANATORY AND FINANCIAL MEMORANDUM

An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.

PART 1

PRELIMINARY AND GENERAL

Section 1 — Short Title and commencement provides that the Act may be cited as the Protected Disclosures Act 2013. The Act comes into operation on such day or days as the Minister may appoint by order.

Section 2 — Provision for review provides that the Minister shall review the operation of the Act after a five year period and make a report to each house of the Oireachtas on the findings of the review.

Section 3 — Interpretation provides for the definitions used in the Bill.

Section 4 — Expenses provides that expenses incurred by the Minister under this Act shall be paid out of moneys provided by the Oireachtas.

PART 2

PROTECTED DISCLOSURES

Section 5 — Protected Disclosures provides that a disclosure is a “protected disclosure” if, subject to subsection (6) and sections 17 and 18, it is a disclosure of relevant information made by a worker in accordance with section 6, section 7, section 8, section 9, or section 10. For the purposes of this section information is “relevant information” if in the reasonable belief of the worker it tends to show one or more of the relevant wrongdoings set out in subsection (3) and it came to the attention of the worker in connection with the worker’s employment.

It is immaterial whether a relevant wrongdoing occurred, occurs or would occur in the State or elsewhere and whether the law applying to it is that of the State or that of any other country or territory (*subsection 4*).

A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer (*subsection 5*).

A disclosure is not a protected disclosure if a claim to legal professional privilege could be maintained in respect of it in legal proceedings and it is made by a person to whom the information was disclosed in the course of obtaining legal advice (*subsection 6*).

The motivation for the making of a disclosure is irrelevant to whether or not it is a protected disclosure (*subsection 7*).

In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is (*subsection 8*).

A disclosure made before the date of the passing of this Act may be a protected disclosure (*subsection 9*).

Section 6 — Disclosure to employer or other responsible person provides that a disclosure is made in accordance with this section if the worker makes it to his/her employer, or where the worker reasonably believes that the relevant wrongdoing relates solely or mainly to the conduct of a person other than the worker's employer, or to something for which a person other than the worker's employer has legal responsibility; to that other person.

Section 7 — Disclosure to prescribed person provides that a disclosure is made in accordance with this section if it is made to a person or body prescribed by the Minister and the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true. The Minister may make regulations prescribing such persons or bodies.

Section 8 — Disclosure to a Minister provides that a disclosure is made in accordance with this section if the worker is employed in a public body, and the disclosure is made to a Minister of the Government on whom any function relating to the public body is conferred or imposed by or under any enactment.

Section 9 — Disclosure to a legal adviser provides that a disclosure is made in accordance with this section if it is made by the worker in the course of obtaining legal advice from a barrister, solicitor or trade union official.

Section 10 — Disclosure in other cases sets out the circumstances in which a disclosure may be made to recipients other than in accordance with *sections 6 to 9*.

A disclosure is made in accordance with this section if the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true, the disclosure is not made for personal gain, any one or more of the detailed conditions set out in *subsection (2)* are met and in all the circumstances of the case, it is reasonable for the worker to make the disclosure. In determining whether it is reasonable for the worker to have made the disclosure regard shall be had to the factors set out in *subsection (3)*.

PART 3

PROTECTIONS

Section 11 — Protection of employees from dismissal for having made protected disclosure amends the Unfair Dismissals Act 1997 by including the dismissal of an employee for having made a disclosure under this Act as one of the grounds deemed to be an unfair dismissal. It further provides that with the exception of members of the Defence Forces and members of An Garda Síochána, the persons excluded from the terms of the Unfair Dismissals Act 1977 set out in *section 2(1)*, *section 3* and *section 4* of that Act are not excluded in the case of an unfair dismissal for having made a disclosure under this Act. The maximum amount of compensation payable by an employer in the case of an unfair dismissal following a protected disclosure is increased from 104 to 260 weeks remuneration.

Section 12 — Other protection of employees from penalisation for having made protected disclosure prohibits the penalisation or threat of penalisation against an employee for having made a protected disclosure. In the event of a contravention of this prohibition the employee shall be entitled to avail of the redress provisions set out in *Schedule 1*. (In the case of members of An Garda Síochána and the Defence Forces the arrangements for redress relating to protected disclosures within those organisations will apply.)

Section 13 — Tort action for suffering detriment because of making protected disclosure provides that where a third party causes a detriment to a worker who has made a protected disclosure the worker who has suffered the detriment has a right of action in tort against the person who causes the detriment. The term “detriment” includes coercion, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment), injury, damage or loss, and threat of reprisal.

Section 14 — Immunity from civil liability for making protected disclosure provides that a person shall not be liable in damages, or subject to any other relief in civil proceedings, in respect of the making of a protected disclosure. The Defamation Act of 2009 is amended so as to confer qualified privilege on a protected disclosure.

Section 15 — Making protected disclosure not to constitute criminal offence provides that in a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for the person to show that the disclosure is, or is reasonably believed by the person to be, a protected disclosure.

Section 16 — Protection of identity of maker of protected disclosure provides that a person to whom a protected disclosure is made, and any person to whom a protected disclosure is referred in the performance of that person’s duties, shall take all reasonable steps to avoid disclosing to another person any information that might identify the person by whom the protected disclosure was made. A failure to comply is actionable by the person by whom the protected disclosure was made if that person suffers any loss. The requirement to protect the identity of the discloser is subject to the qualifications set out in *subsection (2)*.

PART 4

SPECIAL CASES

Section 17 — Law enforcement, public safety etc. provides that an external disclosure of information to which this section applies, other than information of the nature referred to in section 18, is not a protected disclosure unless the disclosure is made not only in accordance with the provisions of *section 10* but also in accordance with the provisions of this section.

With the exception of matters which contain taxpayer information an external disclosure relating to any of the matters set out in this section must be made to a member of Dáil Éireann. In the case of a disclosure containing taxpayer information an external disclosure may only be made to the Comptroller and Auditor General.

Section 18 — Security, intelligence, defence and international relations provides that a disclosure of information to which this section applies is not a protected disclosure unless it is made in accordance with the provisions of *section 6*, *section 8*, or *section 9* or to the Disclosures Recipient established in accordance with *Schedule 2*.

Section 19 — Amendment of Garda Síochána Act 2005 inserts a new section in that Act requiring that the Minister for Justice and Defence shall, following consultation with the Garda Commissioner, the Garda Síochána Ombudsman Commission and the Inspectorate, and with the approval of Government, make regulations providing procedures for the making of protected disclosures and the securing of redress by members of An Garda Síochána for having made a protected disclosure.

Section 20 — Amendment of Ombudsman (Defence Forces) Act 2004 inserts a new section in that Act providing for the consideration by the Ombudsman for the Defence Forces of complaints made by members of the Defence Forces in relation to penalisation following the making of a protected disclosure.

PART 5

MISCELLANEOUS AND SUPPLEMENTARY

Section 21 — Internal procedures for protected disclosures made by workers in public bodies requires that every public body shall establish and maintain procedures for dealing with protected disclosures made by workers employed by the public body and that the public body shall provide written information relating to the procedures to its workers.

Section 22 — No contracting-out of protections provides that any provision in an agreement is void in so far as it purports to prohibit or restrict the making of protected disclosures, to exclude or limit the operation of any provision of this Act, to preclude a person from bringing any proceedings under or by virtue of this Act, or to preclude a person from bringing proceedings for breach of contract in respect of anything done in consequence of the making of a protected disclosure.

Section 23 — Protection of disclosure provisions in other enactments provides for amendments to the Acts and Statutory Instrument set out in *Schedule 3*.

SCHEDULE 1

REDRESS FOR CONTRAVENTION OF SECTION 12(1)

This Schedule sets out the redress provisions for a contravention by an employer of the restriction on the penalisation of an employee under *Section 12(1)*.

SCHEDULE 2

DISCLOSURES RECIPIENT

This Schedule establishes the office and functions of Disclosures Recipient to whom external disclosures relating to any of the matters set out in *section 18* may be made.

SCHEDULE 3

AMENDMENTS

This Schedule sets out the amendments to sixteen Acts and one Statutory Instrument which contain protected disclosure type provisions.

FINANCIAL IMPLICATIONS

The legislation is not expected to give rise to any significant direct Exchequer costs. It is envisaged that the cost of the appointment of a Disclosures Recipient will be met from within existing resource allocations.

*Department for Public Expenditure and Reform,
Meitheamh, 2013.*